

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUIS LEE THOMAS,

Defendant-Appellant.

UNPUBLISHED

September 18, 2008

No. 277256

Kent Circuit Court

LC No. 06-006000-FC

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant argues that the trial court erred by preventing him from presenting extrinsic evidence to prove that the victim is a drug dealer, which in turn deprived him of his constitutional right to present a defense. Defendant preserved this alleged constitutional error; therefore, we review this issue de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

A criminal defendant has a federal and state constitutional right to present a defense. US Const, Am XIV; Const 1963, art 1, § 13. However, the constitutional right to present evidence in his defense is not absolute. *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). “It is well settled that the right to assert a defense may permissibly be limited by ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

It is within the trial court’s discretion to decide whether to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). “MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters” *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). Extrinsic evidence is “[e]vidence that is calculated to impeach a witness’s credibility, adduced by means other than cross-examination of the witness.” Black’s Law Dictionary (8th ed). Unless the impeachment involves a matter closely bearing on the defendant’s guilt or innocence, counsel is required to

accept an answer given by a witness on cross-examination regarding a collateral matter. *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002).

Here, defendant sought to introduce witness testimony that the victim is a drug dealer. Although defendant argues that the extrinsic evidence was necessary to his defense, to show that other people may have been motivated to shoot the victim, the proposed evidence would not show bias so much as reveal irrelevant bad acts by the victim, which is inadmissible character evidence. MRE 404(b). It does not logically follow that a drug dealer may be shot simply because of his status as a drug dealer, although that certainly could be a hazard of the activity. Defendant did not identify another person or persons who had a conflict with the victim because of the victim's alleged status as a drug dealer, and thus the fact that the victim may have been susceptible to being shot because he is a drug dealer is speculative and irrelevant, and did not closely bear on defendant's guilt or innocence. See *LeBlanc, supra* at 590; MRE 401. The trial court properly excluded extrinsic evidence regarding defendant's alleged drug-dealing activities.

Defendant also argues that he was deprived of his constitutional right to confront the witnesses against him when the trial court limited defendant's cross-examination of the victim, specifically not allowing defense counsel to inquire whether defendant lost \$3,000 of cocaine belonging to the victim. A defendant has a federal and state constitutional right to confront witnesses against him. US Const, Am XI; Const 1963, art 1, § 20. The Confrontation Clause, however, only guarantees the defendant a reasonable opportunity to test the truth of a witness' testimony. *People v Slovinski*, 166 Mich App 158, 169-170; 420 NW2d 145 (1987). "A primary interest secured by the Confrontation Clause is the right of cross-examination." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The Confrontation Clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985) (emphasis in original).

No violation of the Confrontation Clause occurred in this case. Defendant had the opportunity to cross-examine the victim, and was able to ask the victim whether defendant lost his property, without bringing in irrelevant bad character evidence about \$3,000 worth of cocaine belonging to the victim. Defendant claims that the questions he wanted to ask were designed to reveal the victim's motive, bias, or prejudice. We conclude that it was not necessary to specify the illegal nature of the property in order to ferret out the victim's motive, bias, or prejudice. See *Boggs v Collins*, 226 F3d 728, 740-741 (CA 6, 2000) (holding that the trial court properly precluded cross-examination of a rape victim about an alleged prior false rape accusation because it would not reveal the motive, bias, or prejudice of the accuser); cf. *Delaware v VanArsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986) (holding that the trial court impermissibly restricted defendant's cross-examination of a witness when it prohibited all inquiry into the witness's potential bias). The trial court allowed defendant to inquire into matters that could have revealed the victim's bias against defendant. We find that the Confrontation Clause was not violated by the restriction placed on questioning.

Next, defendant argues that he was denied his constitutional right to effective assistance of counsel when defense counsel opened the door to damaging hearsay evidence. Defendant did not preserve his ineffective assistance claim by raising his claim in a motion for a new trial or an evidentiary hearing. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Consequently, this Court's review is limited to mistakes apparent on the record. *People v Sabin*

(*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for trial counsel's errors, there is a reasonable probability that the results of defendant's trial or sentencing would have been different; and that the proceedings were fundamentally unfair or unreliable. *Toma, supra* at 302-303; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

When cross-examining the detective who interviewed defendant, defense counsel asked, "Everybody else who may have claimed that Marquis shot Jermelle only knows that because Jermelle told them or someone who [sic] Jermelle told told them, correct?" The detective answered, "That's not correct, sir." The attorneys then approached the bench for a short conference off the record, and the trial court subsequently directed the detective to answer the question. The detective stated that, when defendant discussed the shooting with a family member, he told the family member that he did not know why he shot the victim. The trial court later explained on the record that he allowed the detective to answer the question because defense counsel "opened the door." Defendant contends that defense counsel erred by causing this otherwise inadmissible hearsay to be admitted.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule contained in the Rules of Evidence. MRE 802. Here, defense counsel elicited testimony from a detective that defendant's aunt reported that defendant told her that he did not know why he shot the victim. On the record before us, it is clear that this statement was not admitted to prove that defendant had, in fact, shot the victim. Rather, the aunt's out-of-court statement was offered to show that at least one person knew that defendant shot the victim because defendant admitted it, as opposed to hearing it from the victim. Because the statement was not offered for its truth, i.e. that defendant shot the victim, the statement did not constitute hearsay. Defendant's claim to the contrary is meritless.

Further, even assuming that defense counsel made a tactical error by eliciting the statement, defendant's ineffective assistance of counsel claim fails. Defendant has failed to show that, but for trial counsel's errors, there is a reasonable probability that the results of defendant's trial or sentencing would have been different, and that the proceedings were fundamentally unfair or unreliable. *Toma, supra* at 302-303; *Rodgers, supra* at 714. The evidence presented overwhelmingly supported the jury's verdict of guilt. The victim testified that defendant shot him, numerous witnesses testified that the victim told them that defendant shot him, and fingerprint evidence placed defendant in the car involved in the shooting. In light of this evidence, we cannot conclude that but for the admission of the aunt's statement, the outcome of defendant's trial would have differed. Moreover, defendant has failed to show, or even argue, that the proceedings were fundamentally unfair or unreliable.

Defendant finally argues that the prosecutor's misconduct deprived him of a fair trial. During his rebuttal closing argument, the prosecutor stated that even without the victim's testimony, there was enough circumstantial evidence to convict defendant. Defendant contends that this argument misled the jury about the sufficiency of the evidence necessary to convict defendant. This Court reviews de novo claims of preserved prosecutorial misconduct to

determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). As a general rule, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal citation and quotation marks omitted). A prosecutor is entitled to argue the evidence and reasonable inferences arising from the evidence. *People v Schumacher*, 276 Mich App 165, 178-179; 740 NW2d 534 (2007).

The prosecutor argued the strength of the circumstantial evidence presented, which in this case was substantial. The argument was entirely proper because it was based on the evidence. *Id.* We find that the jury was in no way misled about the evidence sufficient to convict defendant. Also, any error in this regard was cured by the trial court's instructions to the jury that statements and arguments of counsel are not evidence, and that it was the prosecutor's burden to prove defendant guilty beyond a reasonable doubt. See, generally, *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto